10-443

In the Supreme Court of the United States

VELDA DOBSON-DAVIS, WARDEN;
EDMUND G. BROWN JR., ATTORNEY GENERAL, *Petitioners*,

v.

KRISTI LYN LUNBERY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), this Court reversed the defendant's conviction for two errors committed by the state court: one in prohibiting the defendant from examining a witness about his recantation of his sworn confession to the charged crime; and a second in "mechanistically" excluding, as hearsay, evidence of the witness's other confessions, despite their trustworthiness and the witness's availability for cross-examination by the prosecution. Here, the Ninth Circuit granted habeas corpus relief on the ground that the state court had violated *Chambers* by excluding proffered hearsay evidence of alleged third-party culpability, even though that evidence did not show that anybody else had confessed to the crime and even though the state court had excluded the evidence only after evaluating its reliability.

Under 28 U.S.C. § 2254(d), was the state court's exclusion of the disputed evidence an "unreasonable application" of any constitutional rule "clearly established" by *Chambers*?

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Velda Dobson-Davis, Warden of the Valley State Prison for Women at Chowchilla, California (the State), respectfully submits the following Reply to respondent's Opposition to the Petition for Writ of Certiorari in this case.

CERTIORARI SHOULD BE GRANTED

Respondent has advanced several arguments in opposition to Petitioner's request for certiorari. (Opp. at 8-15.) When fairly considered, each of them should lead this Court to grant Petitioner's request.

A. Garza's Statement Was Not A "Confession" Like Those In *Chambers*

First, respondent asserts that "the state mischaracterizes the decision of the Ninth Circuit and the facts of the case." (Opp. at 8-9.) She argues that Garza's admission—"That's a bummer, my partners blew away the wrong dude" "was a statement against his penal interest. It was not simply a statement attributing the crime to other people as stated by the State." (*Id.* at 9.) In urging that Garza's statement was against his penal interest, respondent merely recites the opinion of the Ninth Circuit panel at 605 F.3d at 761. (Opp. at 9.)

The State has already explained why Garza's statement "was not self-incriminatory," because it "attributed the crime to more than one unidentified 'partner.'" (Pet. at 13.) Such a statement bears little resemblance to the evidence wrongfully excluded in *Chambers v. Mississippi*—"the testimony of the three witnesses to whom McDonald had admitted that *he* shot the officer." *Chambers v. Mississippi*, 410 U.S. 284, 292 (1973) (italics added). This Court identified McDonald's admissions as "confessions," *id.* at 300, each of which "was in a very real sense self-incriminatory and unquestionably against interest." *Id.* at 301.

Echoing the Ninth Circuit, respondent contends that Garza "exposed himself to [the] risk of criminal prosecution. At a minimum, he was an accessory after the fact. At a maximum, he was an accessory [be]fore the fact or a co-conspirator with the killers and subject to the same penalty as the actual murderer." (Opp. at 9.) But respondent's restatement of the Ninth Circuit's analysis does not establish that Garza's statements were "unquestionably against interest" like McDonald's statements in *Chambers*, 410 U.S. at 301. Cf. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence").

Moreover, in relying on the Ninth Circuit's analysis, respondent merely repeats that Court's error in failing to accord deference to the opinion of the state court of appeal, which found the statement attributed to Garza had been properly excluded under California's rules of evidence. (App. 13a-16a.) The state court of appeal reasonably concluded that Garza's statement was not against his penal interest "because he did not admit, and implicitly denied, playing any personal role in the murder." (*Id.* at 14a.) The Ninth Circuit analyzed the penal-interest issue as though its review were *de novo*. Instead of according deference to the state Court of Appeal's finding, the Ninth Circuit simply disregarded it.

B. *Chambers* Has Resulted In Various And Selective Interpretations

As the State has explained (Pet. at 8), the Ninth Circuit divined from *Chambers* a rule that the constitutional right to present a defense "is violated by the exclusion of probative admissible evidence that another person may have committed the crime." *Lunbery*, 605 F.3d at 760. Respondent calls this reading of *Chambers* "correct[]." (Opp. at 9.)

Of course, the actual holding of *Chambers* is not so easily summarized. This Court reasoned:

> The testimony rejected by the trial court here bore persuasive assurances of trustworthiness

> and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Chambers, 410 U.S. at 302.

Thus, the holding of *Chambers* depended upon 1) evidence of a certain *type* (multiple confessions by a third party) and 2) of a certain *quality* (bearing "persuasive assurances of trustworthiness") and 3) of a certain *importance* ("critical" to the defense), that was excluded by 4) judicial action of a certain type (the "mechanistic[]" application of the hearsay rule). Where only some, but not all, of these factors are present, *Chambers* is not violated. For example, it "does not stand for the proposition that the accused is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence." *United States v. Scheffer*, 523 U.S. 303, 316 (1998); *see also Montana v. Egelhoff*, 518 U.S. 37, 53 (1996) (Scalia., J., plurality opinion) (holding of *Chambers* "'is certainly not that a defendant is denied 'a fair opportunity to defend against the State's accusations' whenever 'critical evidence' favorable to him is excluded").

Citing decisions of some federal courts of appeals, respondent asserts that they demonstrate "that *Chambers* established that a defendant's due process rights may be violated by the exclusion of critical, probative defense evidence." (Opp. at 12.) If this is the holding that *Chambers* clearly established, it provides little guidance to trial courts at all, and can hardly be deemed the kind of "clearly established law" that could have served as the basis for habeas corpus relief allowable by AEDPA in this case.[1]

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[1] Elsewhere in her Opposition, Respondent asserts that *Chambers* "mandated" "two important factual considerations." (continued...)

More recently, this Court has recognized that "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006). Because *Chambers* forms an exception to these well-established rules, it is vitally important for state and federal courts to know exactly what type of evidence must be admitted and under what circumstances. Granting certiorari in this case will help provide that guidance.

C. The Ninth Circuit Misapplied The Governing Standard Of Review

Respondent commends the Ninth Circuit's application of 28 U.S.C. § 2254 in this case. (Opp. at 13-15.) Her reasons for doing so do not withstand scrutiny.

First, respondent asserts that "[t]he Ninth Circuit's decision in this matter properly applied the clear constitutional principles this Court reiterated in *Chambers*." (Opp. at 13.) As the State has demonstrated, however, the Ninth Circuit's expansive reading of *Chambers* does not fairly account for all the relevant "facts and circumstances" present in that case and necessary to its holding. *Chambers*, 410 U.S. at 303. Indeed, a plurality of this Court has expressed doubt over whether "such a fact-intensive case" contains any discernible holding at all. *Egelhoff*, 518 U.S. at 53 (Scalia., J., plurality opinion).

Next, respondent applauds the Ninth Circuit's "fact-specific analysis of the two important factual considerations mandated by this Court's holding in

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(...continued)
which she identifies as "the critical exculpatory value and reliability of Ms. Lunbery's excluded evidence." Why *Chambers* emphasized these two considerations as "important" relative to the others, she does not explain.

Chambers: the critical exculpatory value and reliability of Ms. Lunbery's excluded evidence." (Opp. at 14.) But following *Chambers*, a reasonable court could find that the statement attributed to Garza was not a confession, as the state court of appeal in fact did. (App. 15a.) A reasonable court could also find that the statement attributed to Garza was insufficiently reliable, as the state court of appeal in fact did. (*Id.* at 15a-16a.) Section 2254 of Title 28 of the United States Code requires that the relevant state-court decision be given the "'benefit of the doubt.'" *Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). Here, the Ninth Circuit analyzed the issue of the reliability of Garza's statement as though no reasonable court could disagree with its decision. *See Lunbery*, 605 F.3d at 761-63. In doing so, it misapplied the governing standard of review. 28 U.S.C. § 2254(d)(1).

Finally, respondent asserts that "the Ninth Circuit properly identified the rule from *Chambers* and cases following that decision, and properly applied the required analysis to the trial court's exclusion of Ms. Lunbery's evidence of Mr. Garza's confession to the murder of which Ms. Lunbery was convicted." (Opp. at 14-15.) This assertion amounts to an argument that the Ninth Circuit's analysis was correct because it applied the applicable law. It does not demonstrate that the Ninth Circuit correctly applied 28 U.S.C. § 2254(d)(1), because "the only question that matters" under that section is whether the state court's decision "is contrary to, or involved an unreasonable application of, clearly established Federal law." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). This Court has explained that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." [Citation.] Rather, that application must be objectively unreasonable. [Citations.]" *Id.* at 75-76. In granting relief, the Ninth Circuit appears to have misapplied the governing standard of review. 28

U.S.C. § 2254(d)(1). As reflected in this Court's many grants of certiorari resulting in reversals of Ninth Circuit decisions misapplying AEDPA (see Pet. at 18 n.2), the Ninth Circuit's error here also warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 28, 2010

Respectfully submitted,

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